

DEC 23 1977

MICHAEL RODAK, JR., CLERK

No. 8 Original

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF ARIZONA,

v. *Complainant*

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT,
IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY
COUNTY WATER DISTRICT, METROPOLITAN WATER DIS-
TRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES,
CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND
COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants

THE UNITED STATES OF AMERICA AND STATE OF NEVADA,
Intervenors

STATE OF UTAH AND STATE OF NEW MEXICO,
Impleaded Intervenors

MOTION FOR LEAVE TO INTERVENE AS
INDISPENSIBLE PARTIES BY THE FORT MOJAVE
INDIAN TRIBE, THE CHEMEHUEVI INDIAN TRIBE,
AND THE QUECHAN TRIBE OF THE FORT YUMA
INDIAN RESERVATION; JOINED IN BY THE
NATIONAL CONGRESS OF AMERICAN INDIANS AS
AMICUS CURIAE

RAYMOND S. SIMPSON, Attorney for
The Fort Mojave Tribe of Indians,
The Chemehuevi Indian Tribe, and
The Quechan Tribe of the Fort Yuma
Indian Reservation
2032 Via Visalia
Palo Verdes Estates, CA 90274

*Attorney for the National Congress
of American Indians, Amicus Curiae*



SUBJECT INDEX

	Page
Tribes Are The Real Parties In Interest	2
Imperative Need To Have Resolved All Issues In Arizona v. California	4
Patent Ambiguities In "Proposed Supplemental Decree"	6
Failure Of Response To Present Correct Status Of Boundary Disputes	9
A. Fort Mojave Indian Reservation	10
B. Colorado River Indian Reservation—Colorado River Tribes Not A Party To This Motion At This Time	11
1. State of California Benson Line Area	11
2. Colorado River Indian Reservation—State of California South of Benson Line	12
3. Colorado River Indian Reservation—State of Arizona	13
a. Ninth Avenue Cut-Off	13
b. Olive Lake Cut-Off	13
C. Cocopah Indian Reservation—Cocopah Tribe Not A Party To This Motion At This Time	14
D. Chemehuevi Indian Reservation	14
Title To Lands Residing In Quechan Indian Tribe	14
Indian Irrigable Acreage Entitled To "Present Perfected Rights" For Which No Claims Were Made In Arizona v. California	15
Denial By Tribes Of Claims Of Movants	17

CITATIONS

Cases:	Page
<i>Arizona v. California</i> , 376 U.S. 340, 342 (1964); 373 U.S. 546, 601 (1963)	7, 10
<i>Arizona v. California</i> , Report of Special Master, December 5, 1960, pp. 279 et seq.	10
<i>Cocopah Tribe of Indians v. Rogers C. B. Morton</i> , Civ. No. 70-573-PHX-WEC	14
<i>United States v. Aranson, et al.</i>	13
<i>United States v. Brigham Young, et al.</i>	12
<i>United States v. Samuel Curtis, et ux</i>	12
 Statutes:	
<i>Public Law 93-638, Act of January 4, 1975</i> , 88 Stat. 2203; 25 U.S.C. 450f	2
 Miscellaneous:	
Appendix A: Mailgram to President Jimmy Carter; Solicitor General Wade McCree, Jr., Justice Department; Secretary Cecil Andrus, Interior Department; Under Secretary James Joseph, Interior Department; Assistant Secretary for Indian Affairs Forrest Gerard, Interior Department from Veronica L. Murdock, President, National Congress of American Indians, Llewellyn Barrackman, Chairman, Confederation of Indian Tribes of the Lower Colorado River, Norvin McCord, Chairman, Fort Mojave Tribe, Frank McCabe, Chairman, Colorado River Tribes. Letter accompanying the aforementioned mailgram from Charles E. Trimble, Executive Director, National Congress of American Indians, 22 November 1977. Letter to Veronica L. Murdock, President, National Congress of American Indians, from Wade H. McCree, Jr., Solicitor General, Justice Department, no date	3
Appendix B: Memorandum, "Western Boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation, Arizona, California and Nevada"	10

III

CITATIONS—Continued

	Page
Memorandum: "Location of the Western Boundary of the Hay and Wood Reserve Portion of the Fort Mojave Indian Reservation	10
Appendix C: Memorandum, "Title to Certain Lands Riparian to Lake Havasu"	14



In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 8 Original

STATE OF ARIZONA,

Complainant

v.

STATE OF CALIFORNIA, ET AL.,

Defendants

UNITED STATES OF AMERICA,

Intervener

**MOTION FOR LEAVE TO INTERVENE AS
INDISPENSIBLE PARTIES BY THE FORT MOJAVE
INDIAN TRIBE, THE CHEMEHUEVI INDIAN TRIBE,
AND THE QUECHAN TRIBE OF THE FORT YUMA
INDIAN RESERVATION; JOINED IN BY THE
NATIONAL CONGRESS OF AMERICAN INDIANS AS
AMICUS CURIAE**

The Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, and the Quechan Tribe of the Fort Yuma Indian Reservation, hereafter referred to as the Tribes, do collectively and individually move this Court for leave to file a petition of intervention upon the following grounds and for the following reasons.

I.

TRIBES ARE REAL PARTIES IN INTEREST

There was filed with the Court on May 3, 1977, a "Joint Motion for a Determination of Present Perfected Rights and the Entry of A Supplemental Decree; Proposed Supplemental Decree; and Memorandum in Support of Proposed Supplemental Decree," hereafter referred to as the Joint Motion.

II.

On November 10, 1977, there was filed with this Court by the Solicitor General, Department of Justice, a "Response of the United States to the Joint Motion for a Determination of Present Perfected Rights and Entry of a Supplemental Decree," hereafter referred to as the Response.

III.

The Tribes are owners of full equitable title in and to "present perfected rights" in the Colorado River, which are set forth in the Court's Decree entered March 9, 1964, Article II D(1)-(5). Those "present perfected rights" are directly and immediately affected by both the Joint Motion and the Response. The Tribes are, therefore, the real parties in interest in regard to the "present perfected rights" referred to in both the Joint Motion and the Response (see Joint Motion, page 6, paragraph I A; see Response, pages 2-6). The Tribes, moreover, assert priorities' from time immemorial.

IV.

On July 16, 1976, all as authorized by Congress,¹ the Fort Mojave Tribe, a movant here, requested the Secretary of the Interior to allow representation in *Arizona v.*

¹ P.L. 93-638, Act of January 4, 1975, 88 Stat. 2203; 25 U.S.C. 450f.

California independent from the Solicitor General. On November 14, 1977, the Secretary of the Interior denied the Mojave request. On November 21, 1977, the Fort Mojave Tribe rejected the representation of the Solicitor declaring it would not be bound by his actions in *Arizona v. California*. (See Appendix A.)

In response, the Solicitor General, on December 2, 1977, advised that the Tribes would be bound by his actions. On December 14, 1977, the Court requested replies from the States to the Response of the United States. On December 16, 1977, the Solicitor General was advised by the Tribes as follows:

Referring to the mailgram dated November 21, 1977, in which the undersigned advised you that your Response to the Joint Motion in *Arizona v. California* would not be binding on the Tribes involved. That rejection is hereby reiterated and reaffirmed. Not only has that representation been grossly inadequate, owing to your inherent conflict of interest, to protect the interests of the Tribes, but your insistence that the Tribes be bound by your representation, as stated in your reply to our mailgram, is clearly violative of your trust obligation, the property rights of the Tribes, and their own civil rights. Any effort to bind the Tribes by your actions will be strongly resisted. (See Appendix A)

On that background, the Tribes have filed this motion and brief in support.

V.

Due to the time constraints confronting the Tribes, there has been insufficient time to properly prepare a complete petition of intervention. Hence, the Court is respectfully requested to consider the content of the Motion and supporting briefs as a basis for allowing intervention. If granted, a full petition of intervention will be filed with the Court within sixty (60) days.

VI.

**IMPERATIVE NEED TO HAVE RESOLVED
ALL ISSUES IN ARIZONA v. CALIFORNIA**

A protracted delay of thirteen years in resolving the issue of "present perfected rights" of the parties in *Arizona v. California* has occurred since the entry of the Final Decree on March 9, 1964. That delay has ensued due very largely to the conflicts of interest of the Secretary of the Interior. The Decree originally entered provided that a list of "present perfected rights" would be submitted to the Court at the end of a two-year period. Since that time, there have been continued negotiations in an effort to resolve the conflict between the claims and "present perfected rights" of the Indians and those of the defendants in this cause.

VII.

Both the Joint Motion and Response, while purportedly resolving the alleged "present perfected rights" of the movants here, leave unresolved a final determination of the "present perfected rights" of the Tribes and, indeed, all "present perfected rights" on the Lower Colorado River. Unless and until the full "present perfected rights" of the Indians can be resolved, there will be no way of determining the measure of the "present perfected rights" of other parties in and to the waters of the Lower Colorado River.

VIII.

The economy of the time of this Court, of the parties and numerous claimants to rights to the use of water and "present perfected rights" in the Lower Colorado River will be adversely affected by the failure to require the disposition in a single proceeding of all pending issues. Continued delay in resolving all of the Tribes' "present perfected rights," as contemplated by the Joint Motion

and Response, will cause irreparable damage and continuing irreparable damage to the Tribes which are already experiencing that damage due to the procrastination in concluding the case of *Arizona v. California*. Without final determination of the long-festered and contentiously disputed "present perfected rights" between the Tribes and the non-Indians, the struggle that prevails today will be greatly increased. There is an imperative need that this Court direct that steps be taken forthwith to conclude all of the disputes. Piecemeal resolution of those issues as contemplated by the Joint Motion and Response must, of necessity, be rejected.

IX.

It is respectfully submitted that neither the Joint Motion nor the Response will have any other effect than greatly to delay the final resolution of the contentious conflicts that are now ongoing, calling for the rejection of both the Joint Motion and the proposed resolution as contained in the Response.

X.

For the Tribes to be forced to accept the false claims of the joint movants to "present perfected rights" without their own being resolved is a product of the all pervasive conflict of interests within the Interior and Justice Departments and a violation by those departments of their trust responsibilities. The Tribes naturally desire the joint movants to subordinate their claimed "present perfected rights" to the Tribes. An effective subordination can and will be prepared by the Tribes. That the proposed subordination in the Joint Motion falls far short of an effective subordination is clear beyond question.

**PATENT AMBIGUITIES IN
"PROPOSED SUPPLEMENTAL DECREE"**

XI.

There are patent ambiguities in the "Proposed Supplemental Decree" particularly in regard to the alleged subordination of the movants' "present perfected rights" to those "present perfected rights," title to which resides with the Tribes.² As set forth in the "Proposed Supplemental Decree," it is declared:

“(5) *In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II(B)(3) of said Decree, the Secretary of the Interior shall, before providing for the satisfaction of any of the other present perfected rights . . . first provide for the satisfaction in full of all rights of the Chemehuevi Indian Reservation, Cocopah Indian Reservation, Yuma Indian Reservation, Colorado River Indian Reservation, and the Fort Mojave Indian Reservation as set forth in Article II(D)(1)-(5) of said Decree. . . .*

(Emphasis supplied)

XII.

Reference is respectfully made to the language of Article II(B)(3) of this Court's Decree which provides

“If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre-feet in the aforesaid three States, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to whom major delivery contracts and such representatives as the respective

² See p. 3, "Proposed Supplemental Decree," pp. 4-5, para. 5.

States may designate, may apportion the amount of remaining available water for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein. . . ." ³ (Emphasis supplied)

XIII.

There is not to be found in Article II(B)(3) any reference to an insufficient supply of mainstream water to satisfy "present perfected rights." Rather, there is provision for the "satisfaction of present perfected rights." As a consequence, there is a clear patent ambiguity between the "Proposed Supplemental Decree" and the Decree that has already been entered by this Court. By reason of that patent ambiguity, there is most certainly a conflict calling for further additional litigation. Thus, rather than resolving the disputes over "present perfected rights," that ambiguity will cause great stress and hardship to the Tribes. They are now using water upon lands which they have brought under irrigation subsequent to the date of the entry of the Decree in 1964.

XIV.

Irrespective of the aforesaid patent ambiguity in the "Proposed Supplemental Decree"—and with full knowledge of it—all as set forth above, the Solicitor General accepted the patent ambiguity in these terms:

"As stated by movants here, although the parties have now reached substantial accord on many points—including the subordination agreement incorporated in the movants' proposed supplemental decree —. . . ." ⁴

³ 376 U.S. 340, 342, Article II(B)(3).

⁴ See "Response of the United States to Joint Motion for a Determination of Present Perfected Rights and Entry of a Supple-

XV.

An additional patent ambiguity appears in the "Proposed Supplemental Decree."⁵ It is there declared that any additional rights to the use of water for lands included within the reservation by reason of resolution of boundary disputes will be entitled to mainstream water which shall not exceed the quantities "necessary to supply consumptive use required for irrigation of additional, practicably irrigable acreage within the additional acres resulting from the enlarged boundaries."

XVI.

The language of the "Supplemental Decree," in the paragraph immediately preceding, does not comport with the language of Article II(D)(1)-(5) of the Decree entered by this Court. In that Article, it is provided, among other things, that the Indian reservations will have entitlements to "present perfected rights" as follows:

"... in annual quantities not to exceed (i) ... acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of ... acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of"

Both the Joint Motion and the Response filed by the Solicitor General do not comport with the language quoted from Article II(D)(1)-(5). Rather, they provide

⁵ "Joint Motion, p. 3, pp. 4-5, paragraph 5.
mental Decree," filed November 10, 1977, by Wade H. McCree, Jr.,
Solicitor General, Department of Justice, Washington, D.C. 20530,
p. 1.

"... mainstream water shall not exceed the quantities necessary to supply the consumptive use required for irrigation of practicably irrigable acreage. . . ."⁶ leaving lands within the reservations with differing criteria for measuring their "present perfected rights."

XVII.

The Tribes are necessarily gravely concerned over the patent ambiguities contained in the Joint Motion, which patent ambiguities have been approved by the Solicitor General, Department of Justice. For this Court to adopt the "Supplemental Decree" with the language setting forth the patent ambiguities is to invite continuing conflicts in the Lower Colorado River between the Indian Tribes and the other adverse claimants to water from the Colorado River. Rather than resolving conflicts, the adoption of the "Proposed Supplemental Decree," as accepted by the Solicitor General, will create continuing and never-ending conflicts among the water users on the Lower Colorado River to their irreparable damage.

XVIII.

FAILURE OF RESPONSE TO PRESENT CORRECT STATUS OF BOUNDARY DISPUTES

Failure in the Response to correctly and fully advise this Court relative to the status of boundary claims of the Tribes falls far short of responsibility owing to this Court and the fulfillment of the fiduciary obligation owing to the Tribes by the National Government. Reference in that regard is made to the correct status of the boundary disputes on the several reservations.

⁶ Joint Motion, "Supplemental Decree," paragraph 5; Response to Joint Motion filed by the Solicitor General, p. 3.

A. Fort Mojave Indian Reservation

On June 3, 1974, the Secretary of the Interior declared ". . . null and void and to have no further force and effect" the survey which established the western boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation. That survey was approved November 15, 1930, and accepted January 23, 1931, by the Department of the Interior.⁷

XIX.

By that Secretarial Order, dated June 3, 1974, the conflict over the western boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation, referred to by the Special Master in *Arizona v. California* in his report dated December 5, 1960, was finally determined.⁸

XX.

By the Secretarial Order of June 3, 1974, an additional, approximately 3580 acres of irrigable lands were recognized as being part of the Hay and Wood Reserve of the Fort Mojave Indian Reservation. Approximately 1500

⁷ See Appendix B, Memorandum entitled "Western Boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation, Arizona, California and Nevada," which Memorandum was from the Secretary of the Interior to the Bureau of Land Management.

See the Memorandum dated June 3, 1974, entitled "Location of the Western Boundary of the Hay and Wood Reserve Portion of the Fort Mojave Indian Reservation." That Memorandum is from the Solicitor of the Department of the Interior to the Secretary of the Interior. Pursuant to that Solicitor's Memorandum, the aforesaid Memorandum of the Secretary of the Interior, establishing the new western boundary of the Hay and Wood Reserve for the Fort Mojave Indian Reservation, was entered.

⁸ Report of Special Master, *Arizona v. California*, December 5, 1960, pp. 279 *et seq.* That aspect of the Report of the Special Master was rejected by this Court in its opinion of *Arizona v. California*, 373 U.S. 546, 601 (1963).

acres of those additional lands are presently irrigated. Those lands, now being part of the Hay and Wood Reserve of the Fort Mojave Indian Reservation, are entitled to have decreed to them "present perfected rights" with a priority of September 19, 1890, all as provided in the Final Decree, Article II(D) (5).

XXI.

Those irrigable acres are entitled to a diversion duty of 6.46 acre-feet for each acre of irrigable land, as part of the "present perfected rights" of the Fort Mojave Indian Reservation.

B. Colorado River Indian Reservation—Colorado River Tribes Not A Party To This Motion

1. State of California Benson Line Area

On January 17, 1969, the Secretary of the Interior, in the exercise of that official's plenary power to establish boundary lines to lands, title to which resides in the United States and the Indian reservations, entered an order which established the western boundary of the Colorado River Indian Reservation "from the top of Riverside Mountain, California, through section 12, T. 5 S., R. 23 E., S.B.M., California."

* See the Memorandum from the Secretary of the Interior, which is dated January 17, 1969, to the Director, Bureau of Land Management Through: Assistant Secretary, Public Land Management, entitled "Western boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, California, through section 12, T. 5 S., R. 23 E., S.B.M., California." That Secretarial Memorandum was predicated upon a Memorandum from the Solicitor to the Secretary of the Interior which is entitled "Western boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, California, through section 12, T. 5 S., R. 23 E., S.M.B., California."

Since the Secretarial Order of January 17, 1969, there have been two cases brought in the Federal District Court involving portions of that Secretarial boundary. They are:

XXII.

By that Secretarial Order, the boundary line that had been previously doubtful has very largely been permanently established. Moreover, the Secretarial Order recognized that approximately 4,000 acres of land were within the Colorado River Indian Reservation. Of that total, approximately 3,673 acres are irrigable in character, part of which are now irrigated. Those additional lands are entitled to have decreed to them "present perfected rights." They must have a diversion duty of 6.67 acre-feet for each acre of irrigable land.

2. Colorado River Indian Reservation-State of California South of Benson Line

A segment of the western boundary line of the Colorado River lying south of the Benson Line remains undetermined. Those lands are situated in Townships 5 and 6, Range 23 East, S.B.M. Irrigated and irrigable lands, owned by the Tribes and entitled to "present perfected rights" in the Colorado River, are situated within that area.

XXIII.

Every effort is now being made by the Tribes acting on their own behalf to have that boundary line determined to the end that those lands can have decreed to them their "present perfected rights," vis-a-vis the movants.

United States v. Samuel Curtis, et ux. Final Judgment entered January 7, 1977, declaring that title to the disputed lands to be in the United States in trust for the Colorado River Tribes.

United States v. Brigham Young, et al. Judgment entered in five (5) parts on December 12 and 13, 1976, and on April 6, 1977. This is a Final Judgment. That Judgment declares that the ownership of the disputed land to be in the United States in trust for the Colorado River Tribes.

3. *Colorado River Indian Reservation—State of Arizona*

There are two areas in the Colorado Indian Reservation which were originally in the State of Arizona but due to avulsive action of the Colorado River are now situated west of that stream and in the State of California. Those two areas are respectfully known as the Ninth Avenue Cut-Off and the Olive Lake Cut-Off.

a. Ninth Avenue Cut-Off

(1) There are 220 acres of land within the Ninth Avenue Cut-Off entitled to have decreed to them "present perfected rights." Those lands have an annual diversion duty of 6.67 acre-feet of water for each acre of land within the Ninth Avenue Cut-Off.

(2) All previous conflicts respecting the title of the Colorado River Tribes to the Ninth Avenue Cut-Off lands have been resolved.

b. Olive Lake Cut-Off

(1) There are 2,058 acres of irrigable and irrigated lands within the Olive Lake Cut-Off for which the Colorado River Tribes are entitled to have decreed to them "present perfected rights" in the Colorado River. Those lands have an annual diversion duty of 6.67 acre-feet for each acre of land within the Olive Lake Cut-Off.

(2) A Final Judgment was entered February 19, 1977, declaring that title to the 2,058 acres within the Olive Lake Cut-Off resides in the United States in trust for the Colorado River Tribes. That Judgment has been appealed and is now pending in the United States Court of Appeals.¹⁰

¹⁰ United States v. Aranson et al.

**C. Cocopah Indian Reservation—Cocopah Tribe
Not A Party To This Motion**

There was entered on May 12, 1975, a stipulated Final Judgment pursuant to which the Cocopah Indian Reservation boundary was resolved.¹¹ By that stipulated Judgment, it was recognized by the Court that there are an additional 883.53 acres of land, more or less, which are part of the Cocopah Indian Reservation. The Cocopah Indian Tribe is entitled to have decreed to it "present perfected rights" in the Colorado River for the lands in question. For those lands, there is an annual diversion duty for each acre of 6.37 acre-feet of water from the Colorado River.

D. Chemehuevi Indian Reservation

By a Secretarial Order dated August 15, 1974, pertaining to the boundary of the Chemehuevi Indian Reservation, it was determined that the reservation encompassed an additional 150 acres of irrigable land.¹² The diversion duty for those 150 acres is at the rate of 5.97 acre-feet for each acre of irrigable land.

XXIV.

**TITLE TO LANDS RESIDING IN
QUECHAN INDIAN TRIBE**

There has been omitted by the Solicitor General from the Response to the Joint Motion any reference to the Quechan Tribe issue which is directly and immediately involved in the issue of "present perfected rights" in the Colorado River.

¹¹ Cocopah Tribe of Indians v. Rogers C. B. Morton, Secretary of the Interior of the United States of America, in the United States District Court for the District of Arizona, Civil No. 70-573-PHX-WEC.

¹² Appendix C, Order of the Secretary of the Interior dated August 15, 1974, with the subject of the Memorandum entitled "Title to Certain Lands Riparian to Lake Havasu."

XXV.

On May 24, 1977, at a meeting with the Solicitor, Department of the Interior, that official gave assurances to the leaders of the Quechan Tribe occupying the Fort Yuma Indian Reservation that there would be an early determination of long-pending issues relative to the title of the Quechan Tribe to the last-mentioned Indian reservation. Since that date, the Quechan Indian Tribe has had no further information from the Solicitor in regard to the all-important issue. Failure of the Solicitor General to include any reference to the Quechan title in the Response to the Joint Motion can do irreparable damage to the Quechan Tribe.

XXVI.

There is an imperative necessity that prior to any action being taken on the Joint Motion, there be resolved this issue as to the title of the Quechan. Involved is a substantial area of highly valuable land entitled to have decreed to it "present perfected rights" in the Colorado River. Each acre of those irrigable lands is entitled annually to 6.67 acre-feet per acre from the Colorado River.¹³

XXVII.

**INDIAN IRRIGABLE ACREAGE ENTITLED TO
"PRESENT PERFECTED RIGHTS" FOR WHICH
NO CLAIMS WERE MADE IN ARIZONA v. CALIFORNIA**

It has been determined by the Bureau of Indian Affairs, Department of the Interior, that there was a failure on the part of the Department of Justice in the hearing before the Special Master in *Arizona v. California* fully to present on behalf of the Indian Tribes all of the irrigable

¹³ Final Decree, Article II(D)(3).

acreage to which the Tribes are entitled to have decreed to them "present perfected rights."

XXVIII.

In the hearing before the Special Master, there was a failure to assert on behalf of the five Tribes "present perfected rights" for 51,253.26 acres which the Tribes were entitled to have decreed to them in *Arizona v. California*.

XXIX.

There follows a tabulation setting forth the irrigable acreage in each reservation for which no claim was asserted for "present perfected rights" before the Special Master in *Arizona v. California*.

Yuma	5,282.32	Irrigable Acres
Chemehuevi	2,367.32	" "
Cocopah	1,175.27	" "
Colorado River	38,769.16	" "
Fort Mojave	3,550.34	" "
Parker Townsite	108.85	" "

51,253.26 Total Irrigable Acres

The tabulated "present perfected rights," as set forth in the Joint Motion, are gravely deficient, failing to set forth the full entitlement to "present perfected rights" for which title resides in the Tribes. That Joint Motion fails to disclose and the Response fails to set forth the proper irrigable acreage for which the Tribes, in both the State of Arizona¹⁴ and the State of California¹⁵ are entitled.

¹⁴ Joint Motion, p. 6, Arizona, 1A.

¹⁵ Joint Motion, p. 11, II California.

XXX.

Irreparable damage will be experienced by the Tribes if the Joint Motion, as responded to by the Solicitor General, is granted. The effect of the issue as joined by the Response to the Joint Motion will result in the Tribes being denied "present perfected rights" for large areas both within the areas of boundary disputes and likewise within the areas for which there was a failure to assert "present perfected rights." Additionally, the patent ambiguities in the Joint Motion will contribute to the historic conflicts of "present perfected rights" between the Indians and the non-Indians.

XXXI.**DENIAL BY TRIBES OF CLAIMS OF MOVANTS**

The Tribes, acting collectively and individually, specifically deny the asserted claims set forth in the Joint Motion on behalf of the Palo Verde Irrigation District;¹⁶ the Imperial Irrigation District;¹⁷ the Reservation Division, Yuma Federal Reclamation Project, California;¹⁸ the Valley Division, Yuma Federal Reclamation Project;¹⁹ the Yuma Auxillary Project, Unit B;²⁰ and the North Gila Valley Unit, Yuma Mesa Division, Gila Project.²¹

XXXII.

The Solicitor General, by conditionally acknowledging the "present perfected rights" of the aforesaid irrigations and projects, gravely threatens the Tribes, collectively and individually, with irreparable and continuing damage.

¹⁶ Joint Motion, p. 11.

¹⁷ Joint Motion, p. 12.

¹⁸ Joint Motion, p. 12.

¹⁹ Joint Motion, p. 6.

²⁰ Joint Motion, p. 6.

²¹ Joint Motion, p. 7.

XXXIII.

The Tribes will prove, if permitted to do so by this Court, that the "present perfected rights," asserted by each of the above-named movants and conditionally approved by the Response filed by the Solicitor General, are in error as to dates of priority, acreage and quantities of water, all as set forth in the Joint Motion.

The National Congress of American Indians, the largest organization of Indian Nations and Tribes in the United States, is fully acquainted with the grave threat to the Tribes due to the course of conduct adhered to in the case of *Arizona v. California* by both the Departments of Interior and Justice. It has consistently supported the Tribes in their efforts to protect their invaluable "present perfected rights" to the use of water in the Lower Colorado River. The National Congress of American Indians joins the Tribes, as *amicus curiae*, in their motion to file with this Court a petition of intervention and joins them in the brief filed in support of that motion.

WHEREFORE, the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, and the Quechan Tribe of the Fort Yuma Indian Reservation, individually and collectively, and the National Congress of American Indians, as *amicus curiae*, respectfully pray this Court as follows:

1. To permit the Tribes individually and collectively to file, within sixty (60) days after the grant of this motion, a petition to intervene in the case and to represent themselves, individually and collectively, as distinguished from the representation of the Solicitor General.

2. To refrain from granting the Joint Motion or from granting any relief prayed for in that Joint Motion.

Respectfully submitted,

(DATE)

RAYMOND S. SIMPSON, Attorney for
The Fort Mojave Tribe of Indians,
The Chemehuevi Indian Tribe, and
The Quechan Tribe of the Fort Yuma
Indian Reservation
2032 Via Visalia
Palo Verdes Estates, CA 90274

*Attorney for the National Congress
of American Indians, Amicus Curiae*



APPENDIX A

Mailgram to President Jimmy Carter; Solicitor General Wade McCree, Jr., Justice Department; Secretary Cecil Andrus, Interior Department; Under Secretary James Joseph, Interior Department; Assistant Secretary for Indian Affairs Forrest Gerard, Interior Department from Veronica L Murdock, President, National Congress of American Indians, Llewellyn Barrackman, Chairman, Confederation of Indian Tribes of the Lower Colorado River, Norvin McCord, Chairman, Fort Mojave Tribe, Frank McCabe, Chairman, Colorado River Tribes.

Letter accompanying the aforementioned mailgram from Charles E. Trimble, Executive Director, National Congress of American Indians, 22 November 1977.

Letter to Veronica L. Murdock, President, National Congress of American Indians, from Wade H. McCree, Jr., Solicitor General, Justice Department, undated.



1a

**THIS MAILGRAM IS A CONFIRMATION COPY OF
THE FOLLOWING MESSAGE:**

**2024663890 MGM TDMT WASHINGTON DC 262 11-21
0417P EST**

ZIP

**WADE H. McCREE, JR.
SOLICITOR GENERAL
OFFICE OF THE SOLICITOR GENERAL
DEPT OF JUSTICE
WASHINGTON DC 20503**

PLEASE TAKE NOTICE THAT THE CONFEDERATED TRIBES OF THE LOWER COLORADO RIVER CANNOT AND WILL NOT CONSENT TO THE CONTINUED IMPOSITION OF PROPOSED REPRESENTATION ON THEIR BEHALF IN THE CASE OF ARIZONA V CALIFORNIA BY THE DEPARTMENT OF JUSTICE, THE TRIBES, COMPOSING THE CONFEDERATION, REFUSE TO BE BOUND BY THE REONSE THAT HAS BEEN FILED BY THE SOLICITOR GENERAL TO THE JOINT MOTION BEFORE THE SUPREME COURT, THE SUPREME COURT SHOULD BE INFORMED BY THE SOLICITOR GENERAL OF THAT REFUSAL AND THAT THE TRIBES WILL NOT BE BOUND BY THE ACTION TAKEN THERE. MOREOVER, THE SUPREME COURT SHOULD BE ACCORDINGLY ADVISED WELL IN ADVANCE OF THAT FACT TO AVOID THE COURT TAKING ACTION BASED UPON THE PENDING JOINT MOTION AND RESPONSE. THEY ARE SHOCKED BY THE REJECTION OF THEIR CLAIM THAT THEY ARE ENTITLED TO WATER FROM TIME IMMEMORIAL AS OPPOSED

2a

TO A DATE WHICH MAKES THEM JUNIOR TO THE PUBLIC CLAIMS BY THE IRRIGATION DISTRICTS INVOLVED. THEY ARE FURTHER DISMAYED BY THE DISREGARD OF THE FACT THAT THEY ARE NOT ASSURED THAT THEY WILL HAVE SUFFICIENT WATER TO CONTINUE THE ECONOMIC DEVELOPMENT OF CERTAIN PORTIONS OF THEIR RESERVATIONS WHICH HAVE BEEN INVOLVED IN BOUNDARY DISPUTES. HENCE, WITH THE ABOVE IN MIND, THE TRIBES MUST AND DO HEREBY REQUEST THAT THE UNITED STATES IN ITS CAPACITY OF TRUSTEE TAKE IMMEDIATE STEPS TO SUPPORT A POSITION FOR INTERVENTION BY THE SAID TRIBES AS INDISPENSABLE PARTIES AND THAT THE SECRETARY OF THE INTERIOR FORTHWITH MAKE SUFFICIENT FUNDS AVAILABLE TO THE CONFEDERATED TRIBES FOR INDEPENDENT LEGAL PROSECUTION OF THEIR TRUE POSITION WITHOUT FURTHER DELAY.

VERONICA L MURDOCK PRESIDENT
NATIONAL CONGRESS OF AMERICAN INDIANS
LLEWELLYN BARRACKMAN CHAIRMAN
CONFEDERATION OF INDIAN TRIBES OF
COLORADO RIVER
NORWIN MC CABE CHAIRMAN
FORT MAJAVE TRIBE

PAGE 2

WESTERN UNION MAILGRAM

[SEAL]

FRANK CABE JR CHAIRMAN
COLORADO RIVER INDIAN TRIBES

17:04 EST

MGMCOMP MGM

[SEAL]

NATIONAL CONGRESS OF AMERICAN INDIANS

Suite 700, 1430 K Street, N.W., Washington, D.C. 20005
(202) 347-9520

November 22, 1977
Mr. Wade H. McCree, Jr.
Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D.C. 20503

Subject: Rejection of Representation by the Solicitor
General in *Arizona v. California*.

Dear Mr. McCree:

There was submitted to you yesterday, 21 November 1977, a mailgram, a copy of which is attached. In that mailgram, the Solicitor General is advised that the Indian Tribes of the Lower Colorado River refused to be further represented by that official in regard to the Joint Motion, filed May 3, 1977, now pending before the Supreme Court. Those Tribes, moreover, assert that they will not be bound by the Response to the Joint Motion filed by the Solicitor General, November 10, 1977, believing it to be greatly deficient and, indeed, totally inadequate. The Tribes there-involved further request that the Supreme Court be advised forthwith of the content of the mailgram. A different course will result in irreparable damage to them if the Court should take action granting the Joint Motion or any relief claimed therein.

The National Congress of American Indians supports the Tribes in the action taken by them and, indeed, join them in signing the mailgram. It is believed that the Solicitor General, having been fully advised of the opposition of the Tribes to the Response which was filed,

acted without power or authority to force upon them his representation before the Highest Court. That action by the Solicitor General was a clear violation of the constitutional, civil and human rights of the Indians to be represented by counsel of their own choosing.

A reply today to the request to the Solicitor General that the Supreme Court would forthwith be advised of their rejection of that official's representation of them in the matter will be greatly appreciated.

A ruling by the Court in the present posture of the Joint Motion and the Response can, as stated, be disastrous to the Indians. It is understood that the Court reconvenes on 28 November 1977, hence the urgency in regard to this matter.

Sincerely,

/s/ Charles E. Trimble
CHARLES E. TRIMBLE
Executive Director
National Congress of American Indians

[SEAL]

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

Ms. Veronica L. Murdock
President
National Congress of American Indians
Washington, D.C. 20005

Dear Ms. Murdock:

Your mailgram of November 21, 1977, indicates concern that the United States' response to the Joint Motion for a Determination of Present Perfected Rights and the Entry of a Supplemental Decree in the case entitled *Arizona v. California*, No. 8 Original, fails to adequately assert the rights of the Indian Tribes of the Lower Colorado River to the waters of the Colorado River. Accordingly, you urge that this Office advise the Supreme Court of the Tribes' refusal to be bound by this response.

The position expressed in the response filed by the United States was based upon the recommendations of the Department of the Interior, which were in turn based upon that Department's extensive consultations with representatives of the tribes having an interest in this matter. Both the Department of the Interior and the Department of Justice are of the view that the position expressed in the government's response fully serves the best interests of all affected Indian tribes, and is thus wholly consistent with the government's fiduciary responsibilities.

This Office does not oppose the Confederation's efforts to express a contrary view to the Court. By letter of November 10, 1977, I advised Mr. Llewellyn Barrackman, the Chairman of the Confederation, of my consent to the filing of an *amicus curiae* response by the Confederation (and those of the individual tribes that might

wish to join the Confederation in such a filing). I also informed Mr. Barrackman that I had informaly advised the Clerk of the Supreme Court that such a filing was contemplated. However, the United States, and all tribes for whom the United States holds rights in trust, will necessarily be bound by any decree entered by the Supreme Court that applies to the United States as a party. It would therefore be both inaccurate and inappropriate for me to purport to advise the Supreme Court to the contrary.

Finally, in your mailgram, you seek the funding of "independent legal" representation in this case for the tribes. The expenditure of funds by the Department of the Interior for "independent legal" representation for Indian tribes in litigation is a matter within that Department's purview. As such, we have forwarded your correspondence to the Solicitor of that Department for such consideration as they deem appropriate.

I trust this is responsive to the concerns expressed in your mailgram. It is a pleasure to be of service.

Sincerely,

WADE H. MCCREE, JR.
Solicitor General

cc: Mr. Llewellyn Barrackman
Chairman, Confederated Tribes of
the Lower Colorado River
Needles, California 92363

Mr. Norwin McCabe
Chairman, Fort Mojave Tribe
Needles, California 92363

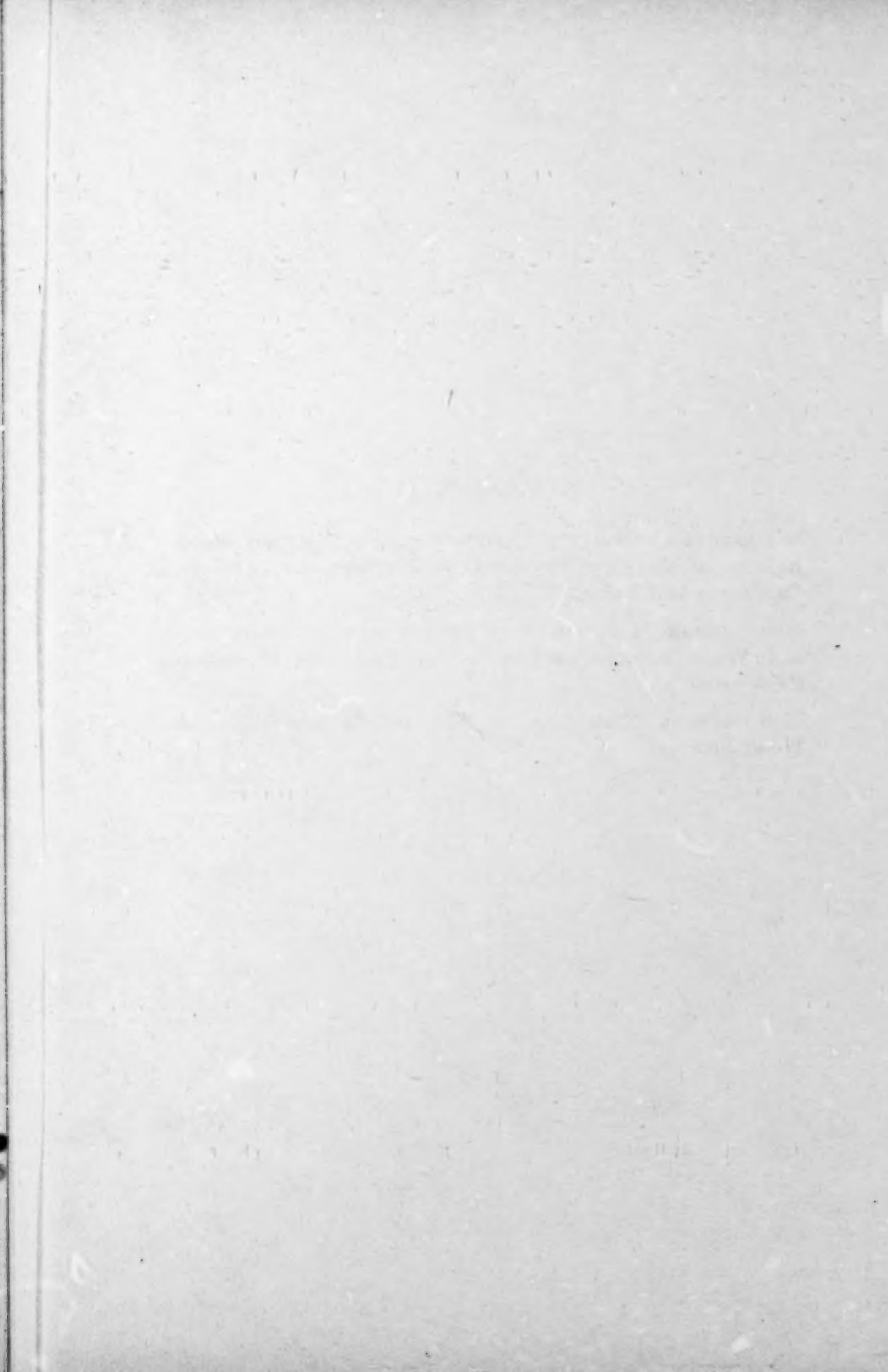
Mr. Frank Cabe, Jr.
Chairman, Colorado River Indian
Tribes
Parker, Arizona 85344

APPENDIX B

Memorandum, "Western Boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation, Arizona, California and Nevada"

Memorandum, "Location of the western boundary of the Hay and Wood Reserve portion of the Fort Mojave Indian Reservation"

Memorandum, "Boundary of the Fort Mojave Hay and Wood Reserve"



1b

[SEAL]

UNITED STATES DEPARTMENT of the INTERIOR

Office of the Secretary
Washington, D.C. 20240

June 3, 1974

Memorandum

To: Director, Bureau of Land Management
Through: Assistant Secretary, Land and
Water Resources

From: Secretary of the Interior

Subject: Western Boundary of the Hay and Wood Re-
serve of the Fort Mojave Indian Reservation,
Arizona, California and Nevada

I have this date received a memorandum from the Solicitor regarding the proper location of the western boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation. A copy of his memorandum is attached.

Acting upon the conclusions expressed in the Solicitor's memorandum, I have determined that the 1928 resurvey conducted by Sidney Blout under direction of the General Land Office, and the plat representing that resurvey of the above-mentioned western boundary of the Hay and Wood Reserve, approved November 15, 1930, and accepted on January 23, 1931, should be declared null and void and to have no further force or effect.

The western boundary of the "Camp Mojave Reservation for Hay and Wood" is most accurately determined and established in accordance with the intent of the original survey by using the courses, distances and acreage as described in the plats and notes of survey accompanying the Executive Order of March 30, 1870. I reject as erroneous those portions of that description which make

reference to posts "marked U.S. in a mound of earth near the left bank of the Colorado River" used in connection with Corner III and Corner IV appearing on the plat and in the notes of survey accompanying the above mentioned Executive Order of March 30, 1870.

Please take all such actions as may be appropriate to implement the conclusions herein stated, including declaring null and void the above-mentioned 1928 resurvey and the plat respecting that resurvey of the western boundary of the Hay and Wood Reserve accepted January 23, 1931, and resurveying the Reserve to conform to the acreage description of 9114.81 acres. Correct Corner III and Corner IV should be reestablished in accordance with the courses and distances described in the plats and notes of the survey accompanying Executive Order of March 30, 1870, to replace the erroneous and rejected Corner III and Corner IV established by the 1928 resurvey.

It is also requested that a determination be made as to what third-party interests may have been established and that appropriate action be taken to subrogate such interests to the Fort Mojave Tribe in those instances in which it is determined that such third-party interests affect the lands inside the now recognized western boundary of the reservation.

Please note the official records accordingly so that henceforth such records will indicate the proper location of the western boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation in the subject area.

/s/ Rogers C. B. Morton

[SEAL]

UNITED STATES DEPARTMENT of the INTERIOR

Office of the Solicitor
Washington, D.C. 20240

June 3, 1974

IN REPLY REFER TO:

Memorandum

To: Secretary of the Interior
From: Solicitor
Subject: Location of the western boundary of the
Hay and Wood Reserve portion of the Fort
Mojave Indian Reservation.

On March 8, 1974, I met with a delegation from the Fort Mojave Tribe who brought to my attention a long standing dispute over the exact location of the western boundary of that portion of their reservation which had originally been the hay and wood reserve for the military post at Camp Mojave. The details of the dispute are set out fully in the attached memorandum to me from the Associate Solicitor for Indian Affairs.

Attorneys in the other divisions of my office have reviewed this dispute and the memorandum from the Associate Solicitor. I have also personally reviewed the matter and discussed it with all the attorneys involved. I am convinced that this Department as a matter of law should acknowledge and declare that the correct western boundary of the Hay and Wood Reserve portion of the Fort Mojave Reservation is most accurately reflected by the courses, distances and acreage descriptions contained in the plats and notes of survey which accompanied the Executive Order of March 30, 1870.

In order to finally resolve this dispute, it will be necessary to declare null and void a previous 1928 resurvey of

4b

this boundary by Sidney Blout of the General Land Office. This 1928 resurvey was approved by the General Land Office in 1931. In 1957, the Secretary approved a tribal constitution which stated that the Hay and Wood Reserve contained 9114.81 acres, which in turn conforms to the courses and distances and acreage description in the 1870 Executive Order.

It is likely that the Director, Bureau of Land Management, may also have to take some other actions to remove any cloud on the right of the Fort Mojave Tribe to use and occupy the area included within the area described by the courses and distances referred to above. In the event you concur, a memorandum to the Director, Bureau of Land Management which would accomplish these results is attached for your signature.

/s/ [Illegible]
Solicitor

UNITED STATES DEPARTMENT of the INTERIOR

Office of the Solicitor
Washington, D.C. 20240

[SEAL]

April 12, 1974

IN REPLY REFER TO:

Memorandum

To: Solicitor
From: Associate Solicitor, Indian Affairs
Subject: Boundary of the Fort Mojave Hay and
 Wood Reserve

I. Facts and Background

A. Statement of the Conflict

The Camp Mojave Military Reservation and the Reserve for Hay and Wood were established "for military purposes" by an Executive Order of President Grant, dated March 30, 1870. The two reserves are located on bottom-lands of the Colorado River where the boundaries of the states of Nevada, California and Arizona come together. By an Executive Order dated September 19, 1890, both reserves were transferred to the Department of the Interior to be held in trust as a reservation for the Fort Mojave Indian Tribe. The boundary description of the two reserves as contained in the 1870 Executive Order and the 1890 Executive Order, is as follows:

Camp Mojave—Commencing at a post marked "U.S." in mound of earth situated N. $83^{\circ} 31' 37''$ E., 66.99 chains distant from the flagstaff at the post; thence variation $14^{\circ} 08' 28''$ east, south $33^{\circ} 08' 28''$ W., 240 chains to a post marked "U.S." in mound of sand; thence north $56^{\circ} 51' 32''$ W. 282.60 chains to a post marked "U.S." in mound of coarse gravel; thence

north $33^{\circ} 08' 28''$ E. 240.00 chains to a post marked "U.S." in a mound of coarse gravel, near the west bank of Beaver Lake; thence south $56^{\circ} 51' 32''$ E. 232.60 chains to the point of commencement. The said boundaries containing 5,582 acres, 1 rood, 24 perches, a little more or less.

Camp Mojave Hay and Wood Reservation—Commencing at a post marked "U.S." in mound of earth situated south $10^{\circ} 43' 41''$ E. 347.52 chains distant from the flagstaff at Camp Mojave and about 20 chains southwest from the point where the road crosses the top of the mesa; thence variation $14^{\circ} 08' 28''$ east, south $1^{\circ} 04' 28''$ W., 272.50 chains to a post marked "U.S." in a mound of earth near the quartermaster's corral; thence south $76^{\circ} 17' 28''$ W. 228.50 chains to a post marked "U.S.") in a mound of earth near the left bank of the Colorado River; thence north $23^{\circ} 01' 32''$ W. 362.70 chains to a post marked "U.S." in a mound of earth near the left bank of the Colorado River; thence south $88^{\circ} 45' 32''$ E. 369.00 chains to the post at the point of commencement. The said boundaries containing 9,114.81 acres, more or less.¹

The present controversy concerns the western boundary of the Hay and Wood Reserve. The language of the War Department Order, relied upon in the Executive Order,

¹ The 1870 Executive Order included within the military reserve: "The intermediate tract lying between the Hay and the Post Reservation, bounded on the West by the Colorado River and on the East by a line running from Station I of the Hay and Wood Reserve to Station I of the Post Reserve."

Inadvertently, this intermediate tract was not expressly transferred by the 1890 order. It was, however, specifically included within the Ft. Mojave Indian Reservation in 1903. *Executive Orders Relating to Indian Reservations: From May 14, 1855, to July 1, 1912*, p. 12 (1912).

This "intermediate tract" clearly belongs to the tribe.

describes the boundaries of each reserve in terms of courses and distances and by reference to the amount of acreage enclosed. Reference in each description is also made to posts placed at each corner. In the case of the Hay and Wood Reserve, the reference to the posts marking the western border locates them as being "near the left bank [or east bank] of the Colorado River." But the existence of this reference creates an inconsistency in the description; if the courses and distances and acreage specified in the order are followed, the western boundary of the Reserve must necessarily be located *west* of the flood plain of the Colorado River.

The Fort Mojave Tribe and the Bureau of Indian Affairs construe the order as locating the reservation boundary west of the Colorado River.² The Bureau of Land Management interprets it as creating the river as the

² Memorandum, March 14, 1973, BIA Area Director Phoenix to Commissioner, Indian Affairs; Memorandum, August 28, 1973, Assistant to the Secretary for Indian Affairs to the Solicitor.

The efforts of the Mojave Tribe to have their equitable title to this land recognized have been of long standing. Beginning in 1910, the State of California petitioned the General Land Office to obtain title to some of the bottomlands located on the western bank of the Colorado River and within the Hay and Wood Reserve as claimed by the tribe and BIA. The state claimed these were public lands, and subject to claim by it pursuant to the Swamp and Overflowed Lands Act of 1850 and 1866. 43 U.S.C. § 987. While the state's petition was rejected in 1910, because GLO acknowledged the western boundary of the reservation was unsettled, the State reasserted its claim after the 1928 Blout survey. This led ultimately to an administrative adjudication in which the Tribe intervened. 8 IBLA 164 (1972).

The results of this determination are inconclusive for present purposes. The Board held against the State on the ground that the lands were not "swamp and overflowed," lands under the act, but did not pass on the tribe's claim to equitable title. The BIA, however, resurveyed the land and its expert witness, Rupkey, testified in the tribe's behalf at the hearing. His testimony is referred to in the footnotes herein as "Rupkey Testimony."

reservation's western boundary.^a At issue between the Indians and BLM is the equitable ownership to approximately 3500 acres of land. This issue has not been definitely resolved between the respective Bureaus, and conflicting interpretations and actions have persisted over the years. Accordingly, I recommend that this matter be submitted to the Secretary for final determination.

I have carefully reviewed the factual background of this long-standing controversy and have considered the pertinent legal principles. I recommend that the Secretary issue an order recognizing the equitable title of the Fort Mojave Tribe to the full 9,114.81 acres specified in the 1870 order. The reasons for my recommendation follow.

B. Historical Background

1. Wheeler Survey

Prior to issuance of the 1870 executive order, the area which became the Hay and Wood Reserve was surveyed by Lieutenant George Wheeler of the U.S. Army.^a Lt. Wheeler spent two days surveying the Hay and Wood Reserve in January 1869, and he took notes of his survey.^b During the same general period, and in rapid succession, Wheeler also surveyed over a dozen other military reservations in the area.

^a The latest memorandum espousing this position is from Clark L. Gumm to Members of the Fort Mojave Task Force, dated May 18, 1971.

^b The lands within the Mojave Valley, including the lands presently in dispute, were part of the lands aboriginally possessed by the Mojave Tribe, and were held by the tribe in "Indian title." 7 Inl. Col. Comm. 219, 253.

^c Lt. George M. Wheeler, Survey Notes, 1868-1869, Books Nos. 2, 10, National Archives, Record Group 77, Records of the Office of the Chief of Engineers.

Thirteen months after his survey was completed,* Lt. Wheeler and an assistant—Mauran—drew a map depicting the Hay and Wood Reserve. The map was drawn in San Francisco using Wheeler's notes. The 1870 map depicts the boundaries of the Hay and Wood Reserve, and it shows the Colorado River as running along the western boundary of the reserve. Its dimensions, however, and its relationship to Fort Mojave are scaled to conform to the courses and distances and the acreage specified in General Order Number 19. The map therefore depicts a physical impossibility, since a reserve of the dimensions portrayed and traced out at the indicated latitude and longitude could never have been established east of the Colorado River.

Little is known of the circumstances surrounding the actual drawing of the 1870 Wheeler map. The map was drawn by J. R. Mauran, one of Wheeler's assistants, and it is signed by Lt. Wheeler. Any records describing the creation of the map were probably lost in the San Francisco earthquake. However, it seems likely that the map would have been drawn by reference to Wheeler's notes and to whatever maps the Army Headquarters had at its disposal in San Francisco at that time. All of the maps available to the Army command in San Francisco in 1870 contained erroneous locations of the Colorado River.⁵ Hence, the most likely explanation of the

* During these thirteen months, Wheeler was occupied on a grueling exploratory mission in southern Nevada unrelated to his surveys in 1868 and early 1869. William H. Goetzmann, *Exploration and Empire* (Alfred A. Knopf 1966), p. 399, 468.

⁵ The maps of the Lower Colorado River available in 1870 to the creators of the Wheeler Map were all slightly erroneous. Three maps known to have been available to the Army in San Francisco at that time have been recovered from the National Archives. The first is the result of an 1855 survey of the Second Standard Parallel North in California by Henry Washington. This line runs east and west terminating in the vicinity of Corner IV of the Hay and Wood Reserve. It is known that Mr. Washington used a defective sur-

1870 Wheeler map is that Wheeler's survey notes were traced onto a map that erroneously located the Colorado River west of its true longitude.

2. The 1870 Order

The boundary descriptions of the two Fort Mojave reserves appeared first in a communication from the Headquarters of the Military Division of the Pacific in San Francisco to the Adjutant General of the U.S. Army in Washington, D. C.* The letter is dated March 12, 1870, and describes eight separate reserves that were surveyed

veyor's chain so that all his measured distances were reported too short. Rupkey Testimony *supra*, Tr. p. 1394. Hence, in reporting the location of the Colorado River, Washington locates it two and one-half miles west of where it actually was in 1855. This would place the river where it never could have been in the foothills west of the alluvial plain. An extensive field survey of the Lower Colorado was undertaken by Lt. J. C. Ives in 1858. Goetzmann, *Army Exploration in the American West, 1803-1863* (Yale 1959), p. 380-393. The National Archives contains two maps that were prepared as a result of this survey. The first map, known as the Ives-Churchill map, was not published as part of the Ives report. It does, however, locate the Colorado River approximately one and a half miles west of its true location. Rupkey Testimony, *supra*, Tr. p. 1394. See also Memorandum from Clark L. Gumm to members of the Fort Mojave Task Force, May 18, 1971 (hereafter "BLM Memorandum") p. 5; *State of California*, 8 IBLA 164, 192-203 (1972).

The second map, dubbed the Ives map of 1861, is the one that accompanies Ives' final report. It depicts the natural contours in greater detail than the first map, and it contains a correction for latitude and longitude. Despite the relocation of the Lower Colorado further eastward, however, the second map still contains errors with respect to the river's proper location. Memorandum from Clark L. Gumm, Chief, Division of Cadastral Survey to Regional Solicitor, Los Angeles, California, July 22, 1971; See also U.S. Geological Survey, *The Deposits of the Colorado River on the Fort Mojave Indian Reservation in California 1850-1969* (1970) n. 3, n. 10. Hence, the Hay and Wood Reserve plotted on either of these maps lies to the east of the Colorado River.

* Letter from Headquarters Military Division of the Pacific to Adjutant General, U.S. Army, Washington, D.C. March 12, 1870, National Archives, Record Group 49.

by Wheeler during his assignment in 1868 and 1869. It recommends that all eight be formally sanctioned as military reserves. President Grant's March 30, 1870, Executive Order adopted the descriptions of the reserves therein without change. Since the letter was written after the 1870 map was drawn, the most reasonable conclusion is that the reference to the left bank of the Colorado River crept into the description at this point. The letter is signed by Major General George Thomas, not by Lt. Wheeler; it is probable that he or his aide inserted the reference to the river in the boundary description after studying the faulty 1870 Wheeler Map.

3. The 1890 Transfer of the Reserve to the Department of the Interior

When the two reserves were transferred to the Department of the Interior in 1890, no new survey was ordered. The Executive Order of September 19, 1890, merely approves the recommendation of the Acting Secretary of War⁷ which recommended that "the Military Reservation of Fort Mojave, Arizona, be transferred and turned over to the Department of the Interior for Indian school purposes". Hence, the cartographic error created in February 1870, received formalization as an executive order in September 1890. The latent ambiguity contained in the Executive Orders went undiscovered until 1903.⁸

4. Subsequent Administrative Actions

Since 1903, however, the inconsistencies in the reservation's boundary description have been recognized by agen-

⁷ The letter is from the Acting Secretary of War, L. A. Grant, to the President, dated September 18, 1890. This type of executive order vests the same type of equitable title in the Indians as a more formal definite executive order. Department of the Interior, *Federal Indian Law* (1958) p. 620.

⁸ Letter from Acting Director, Geological Survey to the Secretary of the Interior July 9, 1903, National Archives, Record Group No. 48.

cies of this Department.⁹ In that year, the Geological Survey requested a clarification of the boundary question prior to completing official maps of the area.¹⁰ The BIA responded that the boundary was the Wheeler Line in the western foothills, regardless of the true position of the Colorado River in 1869 or in more recent times.¹¹ The General Land Office apparently took a contrary position, as it ordered a resurvey of the reservation in 1905. The special instructions issued by the Surveyor General to John Fisher, the surveyor, told him to survey the east, and south boundaries of the Hay and Wood Reserve and to treat the Colorado River as the western boundary of the entire reservation, including Camp Mojave, the Hay and Wood Reserve and the intermediate tract.¹² [No official plat was prepared adopting this survey. The 1905 survey is significant, however, in that it confirmed the location of the flagstaff used by Wheeler.]

⁹ I attach relatively little weight to correspondence and documents that do not show any awareness of the potential for conflicting interpretations. For example, the first Reservation Superintendent, after the land was transferred to this Department, stated in a letter to the Commissioner of Indian Affairs dated December 8, 1891, that "the Hay and Wood Reservation is located . . . entirely on the East Bank of the Colorado River The Colorado River . . . is the western boundary of the Hay and Wood Reservation." However, the same letter states that the total acreage of the Hay and Wood Reservation is "9,114.81."

¹⁰ William H. Goetzmann, *Army Exploration in the American West, 1803-1863*. (Yale 1959) pp. 380-393.

¹¹ Letter from Commissioner of Indian Affairs to the Secretary of the Interior, July 16, 1903, National Archives, Record Group No. 48. This BIA position may not have been consistently held throughout all the intervening 70 years. For example, the Commissioner of Indian Affairs concurred in a February 27, 1929, letter from the Acting Assistant Commissioner of the General Land Office to the Secretary of the Interior, which letter stated (based on a 1928 GLO survey to be discussed *infra*) that the western boundary as established by the courses and distances in the 1870 Wheeler Map was erroneous.

¹² See Memorandum from Area Director to Commissioner of Indian Affairs, March 14, 1973, *supra* Note 1 attachment Exhibit C.

The General Land Office conducted another survey in 1928. The instructions to Surveyor Sidney Blout pre-judged the issue in dispute: Blout was directed to determine where the Colorado River flowed in 1869 and establish the western boundary of the Reserve in a line along the eastern bank of the old river course.¹³ Blout resurveyed the Hay and Wood Reserve accordingly, and the resultant official plat was adopted by the General Land Office in January 1931.

Several aspects of the Blout survey deserve mention. The new plat reduces the size of the original Wheeler plat by 3,500 acres, which is in excess of 33 percent of the originally specified 9,114.81 acres. Secondly, the courses and distances for the Blout plat do not correspond to those of the Wheeler plat. Thirdly, the truncated Hay and Wood Reserve does not stand in the same relation to the Fort Mojave Military Reserve as did Wheeler's Hay and Wood Reserve. Hence, the Blout survey created a reserve that is substantially different from that described in the Order of 1870.

In 1941, the GLO ordered another survey of the lands that were removed from the Hay and Wood Reserve by the Blout Line.¹⁴ These lands were accordingly surveyed and subdivided by Vander Meer and thereafter, as part

¹³ *Id.*, Attachment Exhibit D. The instructions, dated January 7, 1928, referred to "a small topographic map accompanying" them and stated:

It will be observed that corners III and IV fall on ground so high as to preclude any possibility of the river having flowed to the west thereof in 1869. This condition can only be explained by assuming serious errors in the lengths of the north and south boundaries of the reservation for hay and wood. You will, therefore, run said boundaries on their record courses but only so far to the west as will place the west boundary in a position that conditions on the ground indicate as its probable position in 1869.

¹⁴ *State of California*, 8 IBLA 164, 183 (1972).

of the public domain, awaited disposal under the various public land laws.

Other agencies have accepted the BIA position. The U.S. Geological Survey has subsequent to the 1928 survey treated the western boundary of the Reserve as extending beyond the Colorado River; the 1950 Needles Quadrant of California and Arizona map clearly identifies the full 9,114.81 acres as an Indian reservation.^{14a} More recently, the United States took the position before the Supreme Court in *Arizona v. California* (No. 9 Original, October Term 1959) that "the specification in the Executive Order of a total area of 9114.81 acres delineated by boundaries defined by courses and distances is controlling."¹⁵ This case was commenced to allocate the waters of the lower Colorado River between the states of that region. The United States as a party claimed water rights for federal lands in those states, including the Ft. Mojave Indian Reservation. This required the Special Master to hear evidence as to the size of the Hay and Wood Reserve. While the Special Master held against the contention of the United States on this point and concluded that the 1928 General Land Office survey correctly determined the western boundary of the Hay and Wood Reserve,¹⁶ the

^{14a} A later map covering a much larger area and entitled "Western United States, 1:250,000, Needles," does show the western boundary is being in accordance with Blout's survey. This later map serves only to prove the inconsistency with which one branch of the Department has dealt with the issue. Geological Survey has two current maps which cover the Fort Mojave Indian Reservation, the 1950 Needles Quadrant and the above referenced map. Yet, the maps place the boundary in different places.

¹⁵ Memorandum of the United States Re Fort Mohave Indian Reservation Boundary, p. 1.

¹⁶ Special Master's Report, pp. 282-83, the Special Master premised his conclusion on the conclusiveness of the GLO survey and its immunity to judicial review. However, any lack of judicial power to review the survey is irrelevant for the present purposes, because the Secretary of the Interior unquestionably has the power

Supreme Court rejected his holding on the grounds that it was unnecessary for resolution of the case. *Arizona v. California*, 373 U.S. 546, 601 (1963). Instead, the Court used the lesser acreage of the Blout Survey for determining the tribe's water allocation, subject to enlargement if the boundary dispute were subsequently resolved in the tribe's favor. 376 U.S. 340, 345 (1964).

The Secretary has not approved the plats created as a result of the Blout survey. In May, 1957, however, the Secretary did approve the Constitution and Bylaws of the Ft. Mojave Tribe, which provide as follows (Article II): ". . . The authority of the Fort Mojave Tribe shall extend to the following land areas: . . . the so-called Hay and Wood Reserve . . . containing approximately 9,114 acres, more or less . . ." I place substantial weight on this action by the Secretary (as did the United States in its brief in *Arizona v. California*,¹⁷). His approval of the tribal constitution and bylaws is neither a ministerial nor an incidental action—it is required by statute,¹⁸ indicates his non-acceptance of the 1928 survey and a contrary administrative interpretation of the 1870 Executive Order, and in my view supercedes the 1931 GLO approval of the Blout survey because that survey is incompatible with the tribe's constitution and bylaws.

II. Legal Analysis

The legal question to be resolved concerns interpretation of the intent of the 1870 and 1890 executive orders. That

to set aside erroneous surveys by the GLO. *Knight v. United States Land Association*, 142 U.S. 161 (1891).

The Special Master also concluded that the 1928 survey correctively determined the boundary with respect to monuments as against courses and distances and area. Special Master's Report pp. 285-287. For the reasons discussed *infra*, I have concluded that the Special Master was in error.

¹⁷ Memorandum of the United States Re Fort Mohave Indian Reservation Boundary, p. 10.

¹⁸ 25 U.S.C. § 476.

intent, it clearly appears, was to create a reserve as surveyed by Lt. Wheeler. I conclude from a detailed analysis of Wheeler's notes and techniques, as follows, that Wheeler surveyed a reserve of 9114 acres, and that the 1870 order intended to establish a reserve of that size. Accordingly, the courses and distances plus the acreage description better describes the intent of the order than does the call to monuments.

A. The Intent of the 1870 Order

Clearly, the drafters of the 1870 order intended to create a reserve as surveyed by Lt. Wheeler. The most likely conclusion—based upon Wheeler's notes, his surveying techniques and the terrain of the area—is that Wheeler did survey a 9,114.81 acre reserve that spanned the Colorado River.

This conclusion is further substantiated by independent evidence of the understanding in the local community at the time as to where the boundaries of the reserve were. There is correspondence from 1872 referring to timber taken from that portion of the reserve lying west of the Colorado River.^{18a}

Wheeler's notes, taken on the scene at the time when the survey was made, describe the terrain and his techniques, and preserve his crucial notations. At least some of these notes have been recovered from the National Archives and have been thoroughly studied and analyzed. Wheeler's survey technique was to establish corner posts for the reserve and then to determine a course and distance description for the reserve. His determinations were made by taking sitings to the corners from two different points outside the reserve through an instru-

^{18a} Letter from Captain Pond, Camp Mojave to Headquarters, March 24, 1872, National Archives, Record Group 393, Ft. Mojave, Arizona. Letters sent.

ment from which angular readings could be obtained. Using the angles so read, distances and acreage could be accurately determined by trigonometry.¹⁹

In his notes for the Hay and Wood Reserve, Wheeler describes the establishment of Corner I and the two surveying stations for taking sites to the corners.²⁰ The actual readings for the sitings from one of these stations to Corners II, III, and IV are recorded. The readings from the other station are not included.²¹ There is no description of the location of the Colorado River in relation to the corners, nor is there a description of the land in the vicinity of Corners III and IV.

In the vicinity of the Hay and Wood Reserve, the Colorado River flows through an alluvial plain approximately five miles wide.²² The plain, or bottomlands, are rich in vegetation. On either side of the plain, the terrain ascends several hundred feet to a sandy, barren plateau. Moving away from the river, the plateau ultimately gives way to rocky foothills and mountains. In contrast to the bottomlands, vegetation on the plateaus and foothills is sparse or non-existent.

Lt. Wheeler established stations from which to survey the Hay and Wood Reserve on the barren plateau to the east of the alluvial plain.²³ Looking west from these points, he sited his instrument at three different corners and

¹⁹ Rupkey Testimony, *supra* n.1, Tr. pp. 1391-1395.

²⁰ Survey Notes, *supra*, n.3.

²¹ Not all of the notebooks used on the Wheeler expedition were available from the National Archives. It is believed that one of these, kept by either Wheeler or one of his colleagues, records the missing readings from Station No. 2.

²² State of California, 8 IBLA 164, 181-182; See also U.S. Geological Survey, the Deposits of the Colorado River on the Fort Mojave Indian Reservation in California, 1850-1969 (1970) p. 8.

²³ Survey Notes, *supra*, n.3.

recorded the angles to each. Two corners, Numbers III and IV, were marked by fires. The third, Corner II, was marked by a flag.

To establish Corners III and IV as advocated by the BIA, Wheeler's men—but not necessarily Wheeler or Mauran—would have had to cross the Colorado River. The river is not, however, visible from the siting stations on the eastern plateau but is concealed by the dense foliage that carpets the bottomlands. It is probable that Wheeler himself never approached the river in the vicinity of the Hay and Wood Reserve, and that he therefore had no personal recollection of its location.

Corners III and IV were not chosen arbitrarily. While there is no proof as to what caused the selection of these spots, the two points are logical locations for surveyors using Wheeler's techniques. Both points are high enough above the flood plain to make possible their use as siting points. Corner III is 120 feet above the flood plain; Corner IV is 320 feet above the flood plain. Here it must be pointed out that, when siting to fires, it is necessary that the base of the fire be visible in order to obtain an accurate reading.²⁴ If, instead, fires had been lighted on the east bank of the river, they would have been hidden from the sight of one standing on the eastern plateau. In addition to being of proper height, both corners can be aligned with an identifying feature of the terrain. A line from Corner III through Corner II is in alignment with Boundary Cone, a prominent peak to the east long used as a natural landmark. Corner IV is due west of the Corner I, and, similarly, a line from Corner IV through Corner I is also in alignment with Boundary Cone. A line between Corners III and IV, while enclosing some uplands, is set far enough west so as to include a bulge in the bottomlands. It is no

²⁴ See Memorandum from Area Director, *supra*, Note 1, Attachment p. 16.

further west than necessary to include all of the bottomlands located between the north and south boundaries of the Reserve.²⁵

The sequence of events in the surveying of the Hay and Wood Reserve most probably went as follows.²⁶ Wheeler and his party went south of the fort along an established road on the plateau to the east of the river. At a point where the road began to descend the plateau into the river's bottomlands, Wheeler established his first siting station. From there and a second nearby station, he took sitings to the flagstaff at the fort in order to establish his position. He then measured off a distance of 24 chains down the plateau and into the bottomlands to establish Corner I. He then returned to the plateau and established a third siting station. Next he sent some of his men across the river to set up fires at what would become Corners III and IV. His men were to locate Corners III and IV by reference to Corners I and II and to natural terrain features. Wheeler then took readings to Corners II, III and IV from stations 2 and 3. Subsequently, he compared readings taken at Station 2 (of which there is no record) to readings taken at Station 3 and, using trigonometry, computed the courses and distances contained in the boundary description.

The available evidence supports this conclusion. The plateau and the road in the vicinity of Corner I have been located and they conform to the sketches in Wheeler's notes. The original flagstaff at Fort Mojave was relocated by the 1905 Fisher survey. Using the readings in Wheeler's notes, his siting stations on the plateau can be reestablished by reference to the flagstaff.

²⁵ The facts of the terrain features are taken from Geological Survey maps for the Needles Quadrant, Calif. Arizona (1950) and the Needles Quadrant, Arizona; and from exhibits introduced by the BIA for the hearings in *State of California*, 8 IBLA 164 (1972).

²⁶ Rupkey Testimony, *supra*, no. 1.

Sitings from these stations to Corners II, III, and IV conform to the readings in Wheeler's notes.

A BJA survey team using modern instruments has resurveyed the reserve following Wheeler's notes.²⁷ The resultant plat is identical to the plat on the Wheeler map, and angular readings and terrain features correspond to those in Wheeler's notes. The acreage within this plat is 9114 acres.

B. The Call to Courses and Distances Plus Area Should, in these Circumstance, Prevail Over The Call to Monuments

While it is true that a call to monuments in a boundary description should generally prevail over courses and distances, the latter must prevail over monuments in cases where the courses andd istances better indicate the intent of the grantor.²⁸ As the Supreme Court has stated:

It is true that, as a general rule, monuments, natural or artificial, referred to in a deed control, on its construction, rather than courses and distances;

²⁷ This resurvey was accomplished as part of the preparation of the case of Ft. Mojave Tribe in *State of California*, IBLA 70-150, the decision of which is reported in 8 IBLA 164 (1972).

²⁸ All authorities on the subject support these propositions. Tiffany says: "In the case of a description by boundaries, as in other cases, the intention of the grantor, as inferred from the terms of the description, is the controlling consideration, and any rules which the courts may have formulated as to the relative importance of various elements of the description are merely intended as aids in arriving at this intention." 4 Tiffany, 3d ed., Sec. 993, pp. 94-95.

Thompson in his works on Real Property, emphasized the importance of the intention of the parties formulating the document containing the description, in these words: " * * * the general rules as to the greater or lesser degree of weight and control to be given to one form of description as compared with another are not absolute but are mere aids to be used in the construction of the deed to discover the real intent of the parties, such intent being the things which governs where there is latent ambiguity!" 6 Thompson on Real Property, 1962 Replacement, Sec. 3021, p. 442.

but this rule is *not inflexible*. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. For instance, if the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify and render certain the land which the sheriff intended to convey, it would certainly be absurd to retain the false call, and thus defeat the conveyance. (*Emphasis supplied.*) *White v. Luning*, 93 U.S. 514, 524 (1876).

Continuing, the Court noted:

"It would therefore be manifestly wrong, not to say absurd, to retain the call for the fence, and reject the call for course and distance. The reason why monuments, as a general thing, in the determination of boundaries control courses and distances, is, that they are less liable to mistakes; but the rule ceases with the reason for it. If they are inconsistent with the calls for other monuments, and it is apparent from all the other particulars in the deed that they were inadvertently inserted, the reason for retaining them no longer exists, and they will be rejected as false and repugnant." (*Emphasis supplied*)

Other courts have held that preference for monuments cannot be applied where the existence of the monument cannot be established and proved. *Hanson v. Red Rock*, 4 S. Dak. 358, 57 N.W. 11 (1893). Further, where the monument referred to is a natural object and its position or shape has changed over time, the boundary described by courses and distances and acreage should prevail. *Smith v. Hutchison*, 104 Tenn. 394, 58 S.W. 226 (1900). See also *Luginbuhl v. Hammond*, 179 Cal. App. 2d 350, 3 Cal. Rptr. 582 (1960).

In this case, none of the posts referred to as monuments in the 1870 Executive Order has ever been dis-

covered and the Colorado River is a natural monument which has undergone radical changes over time.²⁹ The rules of comparative dignity of calls in a boundary description are rules of construction adaptable to the circumstances and the intention of the conveying instrument. *United States v. Redondo Development Company*, 254 Fed. 656 (8th Cir. 1918); *Ewart v. Squire*, 239 Fed. 34 (4th Cir. 1916). They are not to be applied so as to defeat the intent of the grantor. *White v. Luning*, 93 U.S. 514 (1876).

The intent of the 1870 Executive Order is clear upon reference to the specification within the Order of a total quantity of 9,114.81 acres. When there is doubt of its true description, designation of quantity may be properly

²⁹ It is well established that for a call to a natural object to be controlling, it must be a locative call and not merely a descriptive or directory call. Locative calls are defined as specific calls, descriptions, or marks of location, referring to landmarks, physical objects, or other points by which the land can be exactly located and identified. Descriptive or directory calls are those which merely direct the neighborhood wherein the different specific calls may be found. *II Corpus Juris Secundum, Boundaries*, Sec. 4. The reference to a marked post in a mound near the river in 1870 manifestly did no more than describe generally the neighborhood of the boundary corner.

The indefiniteness of "near" is well illustrated by the case of *Creech v. Johnson*, 116 Ky. 441, 76 S.W. 185 (1903) involving a call in a state patent to a stake "near Cumberland Gap." The Court there, in construing the patent, "reversed" the calls so as to give effect to the intent to grant a specified number of acres, even the result was to locate the corner in question five miles from Cumberland Gap, the Court holding that such location might reasonably be spoken of in the survey, as "near Cumberland Gap." See also *Mizell v. Simmons*, 79 N.C. 182 (1878), to the effect that courses and distances must prevail over a call "to or near" the head of a certain creek.

More specifically, the California Court of Appeals has ruled that the expression "near the river" is not the equivalent of a description reading "at the river bank" and refused to hold that that language fixed the river bank as a controlling monument. *San Pedro, L.A. & S.L. R. Co. v. Simmons Brick Co.*, 45 Cal. App. 57, 187 P. 62 (1919).

considered, *Chapman & Dewey v. St. Francis*, 232 U.S. 186, 197 (1914). *Field v. Columbia*, Fed. Case No. 4764, 4 Sawy. 523 (1864). And it may have controlling weight, particularly if there is uncertainty in the specific description. *Montana Mining Co. v. St. Louis Mining & Milling Co.*, 183 Fed. 51 (9th Cir. 1910).

The Supreme Court in *Ainsa v. United States*, sustained the all-controlling factor of intent saying:

So monuments control courses and distances, and courses and distances control quantity, but where there is uncertainty in specific description, the quantity named may be of decisive weight, and necessarily so if the intention to convey only so much and no more is plain. 161 U.S. 208, at 229 (1895).⁹⁰

Nor does the addition of the words "more or less" detract from the significance of the specification within the Executive Order of a quantity of 9,114.81 acres. Used in connection with quantity, these words are merely words of safety and precaution, intended to cover some slight or unimportant inaccuracy. 6 Thompson on Real Property, Sec. 3353. The Supreme Court has specifically rejected the words "a little more or less" when used in a grant which clearly expresses the quantity. *United States v. Fossat*, 61 U.S. (20 How.) 413, 427 (1957).

In interpreting the Executive Orders of 1870 and 1890, moreover, any ambiguities should be construed in favor of the Mojave Indians. It is well settled that in any treaty or agreement with an Indian tribe, ambiguous language is to be construed in favor of the Indians or as the Indians would have understood it. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

⁹⁰ Accord: *Security Land & Exploration Co. v. Burns*, 193 U.S. 167, 179-180 (1904).

Nor is this rule of construction strictly limited to interpretations of treaties. The Supreme Court has stated in a case involving an executive agreement:

"But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases." *Choate v. Trapp*, 224 U.S. 665 at 675 (1912).

The same rule applies when construing statutes that apply to Indians. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Squire v. Capoeman*, 351 U.S. 1 (1956); *United States v. Santa Fe Pac. R.*, 314 U.S. 339, (1941); *Bennett County v. United States*, 394 F.2d 8 (8th Cir. 1968); *Drummond v. United States*, 131 F.2d 568 (10th Cir. 1942).

/s/ Reid Peyton Chambers

/s/ John Wyeth Griggs

/s/ [Illegible]

Copy to:

Mr. Lindgren

Mr. Striegel

Commissioner Thompson

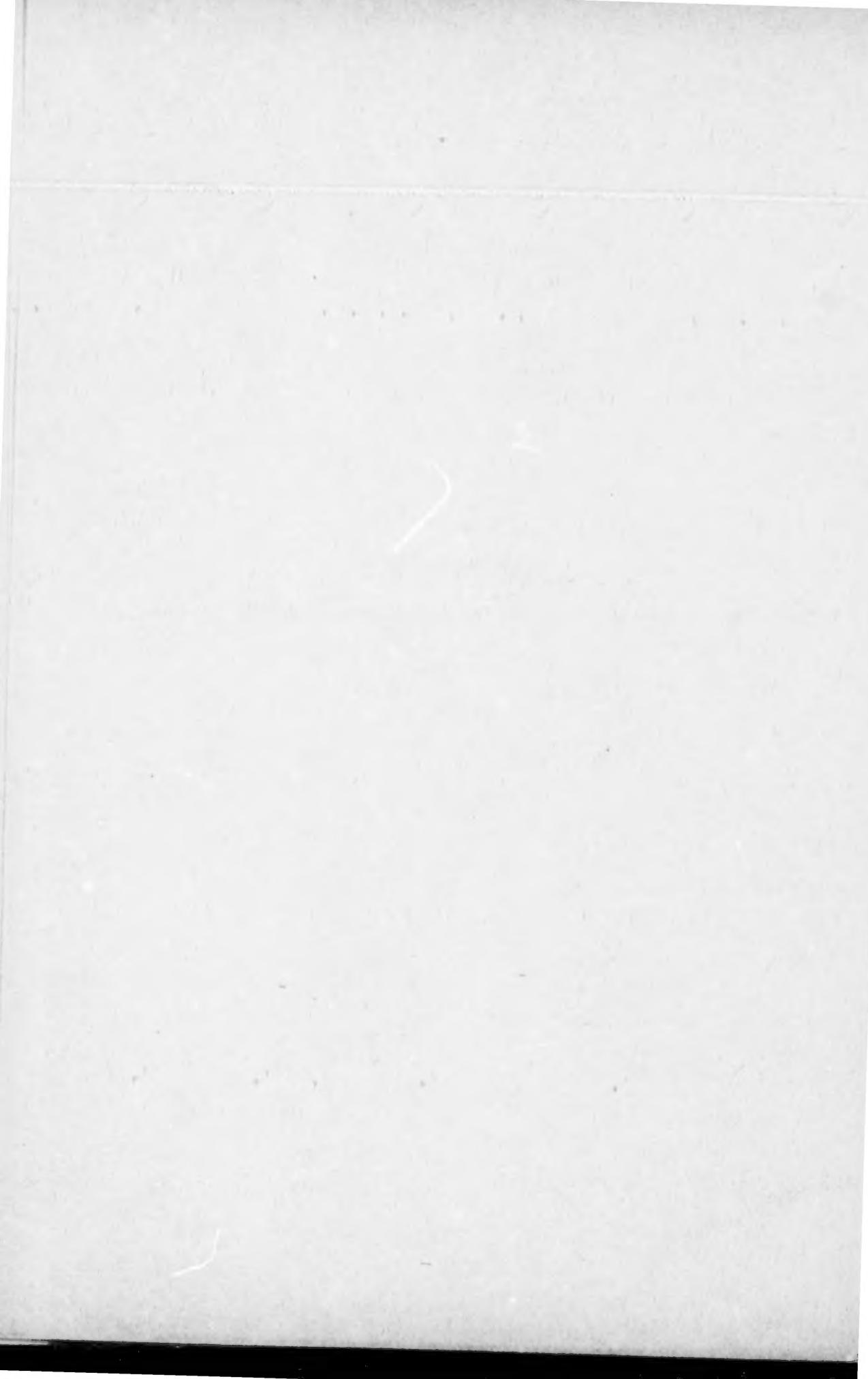
Mr. LaFollette Butler

Mr. Veeder

Mr. McHale

APPENDIX C

Memorandum, "Title to Certain Lands Riparian to Lake Havasu"



[SEAL]

UNITED STATES DEPARTMENT of the INTERIOR
Office of the Secretary
Washington, D.C. 20240

Aug. 15, 1974

Order

To : Assistant Secretary for Fish and Wildlife and Parks
Assistant Secretary—Land and Water Resources
Commissioner of Indian Affairs

From : Acting Secretary of the Interior
John C. Whitaker

Subject : Title to Certain Lands Riparian to Lake Havasu

I have today determined to correct the designation by Secretary Ickes of November 25, 1941 that certain lands of the Chemehuevi Indian Reservation should be taken for use in the construction of Parker Dam pursuant to the Act of June 8, 1940, 54 Stat. 744. The corrected designation determines, establishes and confirms that the Chemehuevi Tribe has full equitable title to all lands within the Chemehuevi Indian Reservation riparian to Lake Havasu designated by Secretary of the Interior Ickes on November 25, 1941, between north and south boundaries as follows:

North Boundary

From a point in Section 18 T5N R25E, located as follows: Beginning at the SE Corner of said Section 18 due west 711 ft; thence N00°21'E a distance of 1304 ft; thence N51°20'W a distance of 1967 ft; thence N01°16'E a distance of 1130 ft. From said point the North Boundary is established on a line S74°08'E to the minimum pool elevation of the west bank of Lake Havasu.

South Boundary

From a point on the south line of Sec. 33, T4N, R26E which is 3156' N89°51'E a distance of 350' more or less to the minimum pool elevation of the west bank of Lake Havasu.

This corrected designation is subject to the reservation of certain rights in the United States as follows:

- (a) The right to deposit spoil and snags from Lake Havasu on said lands at locations mutually agreeable to the United States and the Tribe, provided that the Tribe's consent should not be unreasonably withheld;
- (b) the right to flood and seep said lands in connection with its operations under the Act of December 21, 1928 (45 Stat. 1057), the Act of August 30, 1935 (49 Stat. 1028), and the said Act of June 28, 1946, (60 Stat. 338), as amended;
- (c) the right of free ingress to, passage over and egress from said lands for the purpose of exercising the above rights and for all lawful purposes in connection with (i) protection, maintenance and administration of the Havasu National Wildlife Refuge, (ii) United States responsibilities relating to administration of the Chemehuevi Indian Reservation and (iii) United States responsibilities relating to Lake Havasu and the Colorado River.

Additionally, the corrected designation is subject to the valid existing rights of private persons. There are two concession contracts and approximately seventy special use permits covering some of the lands in question. These expire at various dates between the present time and 1984. I direct that they be extended, to the extent necessary, until the following dates:

(1) *Residential permits*

- (a) *Residents who use the permitted lands as a full time residence for a substantial portion of*

each year. I am informed that at least ten permittees are substantially full-time residents.* The latest of these permits expires on July 31, 1979. I direct that each of these permits should be extended until August 15, 1980. In addition, I am advised that several other permittees claim that they are substantially permanent residents of the area. If any individual permittee wishes formally to claim such status, by a letter directed to me, within sixty days of this date, I direct the Office of Hearings and Appeals of this Department promptly to hold an informal hearing at Havasu Landing to determine the validity of all such claims. The tribe may participate in that hearing. I reserve the right to, and will, extend any such permit until August 15, 1980 if the permittee is determined by the Office of Hearings and Appeals to be a substantially full-time resident.

- (b) *Other residential permittees (including those who use the permitted lands for weekend and vacation homes).* All such individual residential permits are to be extended until August 15, 1977.

* These are as follows:

Lot No.	Permittee	Permit Number
3	L.G. & Rose M. Pasley	23503
9	J.D. & Miriam Squires	23502
12	Aaron J. & Iona R. Laur	19774
18	John W. Goodgame	HAV-58
19	Dorothy Holley	12094
28	Dick & Eunice Parton	19745
31	Joseph, Jr. & Rosemary Benjamin	14800
40	Leo Rossler	19742
52	Leonard M. Vogt	HAV-52
56	Edward F. Patterson	HAV-73

- (2) *Non-residential permittees.*** These permits shall be extended until August 15, 1976.
- (3) The concession contracts expire in 1979 and 1984. They will not be extended, but until their expiration the Tribe will not interfere with the rights of the contractors or the general public to have access to the lands under contract as such reasonable locations as the Secretary shall determine.

Any of these permittees may obtain further extensions at the option and with the consent of the Tribe. All permit extensions here directed shall be subject to revision of the annual use fee, to be the fair market value of the land without improvements, at the date the present permit expires. I direct that all necessary appraisals be made at that time, and that all use fees shall be apportioned between the tribe and the United States from and after this date.

This corrected designation shall also be subject to all rights of the Metropolitan Water District of Southern California under that District's contract with the United States, captioned "Cooperative Contract for Construction and Operation of Parker Dam," dated February 10, 1933 (Designated 11r-712, as supplemented and amended by contracts between the same parties dated September 29, 1936, April 7, 1939 and December 16, 1952).

Finally, the corrected designation provides that the tribe shall not construct any permanent improvements within 300 feet of the minimum pool level of Lake Havasu.

** These are:

<u>Lot No.</u>	<u>Permittee</u>	<u>Permit Number</u>
34	Rialto Fish & Game Club	14821
58 & 59	California Division of Fish & Game	14834
66	The Plunkers Club	19747
100	Needles Rod. Boat & Gun Club	12081

5c

I direct that all necessary steps shall be taken to implement this decision, including modification of the boundaries of Havasu National Wildlife Refuge as established by Executive Order of President Roosevelt on January 22, 1941.